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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

U-HAUL CO. OF CLEVELAND,
Petitioner,

v.

LEE KUNKLE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the same two questions on which the Court granted certiorari in *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008:

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that he is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*

2. If it does not create such a presumption, what weight, if any should be given to the application for, or receipt of, disability insurance benefits when a person asserts he is a "qualified individual with a disability" under ADA?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner U-Haul Co. of Cleveland, a defendant in the District Court and appellant in the United States Court of Appeals for the Sixth Circuit, is a wholly owned subsidiary of U-Haul International, which is in turn a wholly owned subsidiary of AMERCO. Petitioner has no non-wholly owned subsidiaries.

Respondent Lee Kunkle was plaintiff in the District Court and appellee in the Court of Appeals.

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner U-Haul Co. of Cleveland ("U-Haul") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court denying U-Haul's post-trial motions is unreported and reproduced at App. 21a. The opinion of the District Court on U-Haul's motion for summary judgment is unreported and reproduced at App. 13a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1998. App. 1a. A timely petition for

rehearing with suggestion for rehearing en banc was denied on November 24, 1998. App. 37a. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343, and 1367, *see* App. 13a, and the jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. §§ 423(d)(1)(A), 423 (d)(2)(A), 12102(2), 12111(8), and 12112(a) are reproduced in Appendix H, beginning at App. 39a.

INTRODUCTION

In successfully seeking disability benefits under the Social Security Act and from a private insurance company, respondent Lee Kunkle ("Kunkle") represented that he was totally disabled from employment. Thereafter, however, Kunkle filed suit claiming that he was qualified to perform the duties of his job at U-Haul and had been discharged in violation of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* The courts below rejected U-Haul's claims that Kunkle was judicially estopped from pursuing his ADA action as a result of his earlier claims of total disability and his continuing receipt of disability insurance benefits.

The question presented in this case—the effect on ADA litigation of earlier claims of total disability in seeking insurance benefits—is currently pending before this Court. In *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008, the Court granted certiorari to resolve the disarray in the courts of appeals over the appropriate impact of an employee's application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, on the employee's suit alleging a violation of the ADA. Because this case presents the same issues the

Court will consider in *Cleveland*, and will likely be resolved by this Court's decision in that case, the Court should defer consideration of this petition until it issues its decision in *Cleveland*, and then dispose of this petition as appropriate in light of that decision.

STATEMENT OF THE CASE

In January 1994, respondent Kunkle was Shop Manager of U-Haul's repair shop in Akron, Ohio, when he was diagnosed with lung cancer. App. 2a. Kunkle had surgery to remove his left lung on February 11, 1994, and it was expected that he would miss six weeks of work. App. 2a, 14a, 23a. On February 24, 1994, Kunkle's wife applied on his behalf for disability benefits under a private insurance policy that conditioned benefits on a finding that the policyholder was unable to perform "every duty of [his] occupation." Def. Ex. J; Ct. App. J.A. at 1094. In the application, Kunkle's surgeon certified that he was "totally disabled" as of February 7, 1994. App. 2a. The application was granted and Kunkle started receiving payments in March 1994. App. 2a.

Kunkle's recovery from surgery did not go as smoothly as hoped. After his surgery, Kunkle lapsed into a life-threatening coma and remained on a respirator for the next eight weeks. App. 14a. As the District Court explained, Kunkle "was diagnosed with adult respiratory distress syndrome and had only a 5% chance of survival." App. 23a. Nevertheless, Kunkle emerged from his coma and was eventually discharged from the hospital in late May 1994. App. 3a, 23a. "He * * * remained in serious condition. He was bedridden, required supplemental oxygen, breathed through a trachea tube, and ate through a stomach tube." App. 3a. "[H]e had lost more than sixty pounds." App. 23a.

Three months into Kunkle's absence from work, and while his physical condition was still quite grave, U-Haul was compelled to take steps to fill his position at the

Akron facility. Kunkle's position as Shop Manager was filled by Terry Mislevy, who had eighteen years of experience with U-Haul, and a mechanic in the shop was named to the new position of Shop Foreman to assist Mislevy. App. 23a.

Kunkle applied for disability insurance benefits with the Social Security Administration at about this same time, on May 21, 1994. App. 2a. In support of his application, he stated that he " 'became unable to work because of [his] disabling condition on February 11, 1994.' " App. 2a. The application was granted in July 1994 and Kunkle began receiving monthly disability benefits of $1088 in August of that year. App. 2a, 14a. Also in August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall, and underwent "a two-month regimen of outpatient radiation and an intensive three-month cardio-rehabilitative program." App. 3a.

In January 1995—eleven months after he initially left U-Haul for what was expected to be a six week absence—Kunkle informed his supervisor, U-Haul President J.P. White, that he was ready to return to work. At a meeting one week later with White and Mislevy, Kunkle was offered the chance to return to U-Haul as Shop Manager in its Cleveland facility, but said he was not interested because he did not want to commute to Cleveland. App. 3a-4a. Kunkle therefore was named Shop Foreman at the Akron facility, returning to work on February 1995 at the same salary he had received as Shop Manager before his year-long absence. App. 4a. He continued to receive Social Security disability benefits despite his return to employment with U-Haul. App. 4a.

The job of Shop Foreman to which Kunkle had returned was more physically demanding than the Shop Manager position he previously held, and which he had declined when it was offered to him in January 1995. Kunkle had difficulty performing some of the physical tasks associated with his new position, particularly requiring assistance

when operating the shop's battery changing station. App. 4a-5a, 24a. In addition, "Kunkle experienced difficulty breathing and occasionally went to his truck to retrieve oxygen." App. 9a. White discharged Kunkle on March 20, 1995, telling Kunkle that he was "not physically capable of doing th[e] job." App. 5a.

Kunkle filed this action in August 1995, alleging, *inter alia*, a violation of the ADA. U-Haul moved for summary judgment, asserting that "Kunkle cannot prevail on his claim because, by receiving Social Security benefits while he returned to work, he is estopped from asserting that he was qualified to perform his work." App. 17a. The District Court rejected this argument, stating without more that "representations by a plaintiff that he is entitled to disability benefits [are] not dispositive of whether he is not qualified to work." App. 17a (citing *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *Morton* v. *GTE North, Inc.*, 922 F. Supp. 1169 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 118 S. Ct. 205 (1997)).

After trial, a jury returned a verdict against U-Haul in the amount of $950,000. U-Haul filed a motion for judgment as a matter of law, asserting as the "primary basis" for that motion its argument that "Kunkle is estopped from being a 'qualified individual with a disability' by statements that he and his physician made to the Social Security Administration and his private insurance carrier." App. 25a. The District Court again rejected U-Haul's estoppel argument. App. 25a-26a.

U-Haul appealed to the Sixth Circuit, and again raised its argument that Kunkle was judicially estopped from claiming to be a qualified individual in light of his earlier claims of total disability and his continued receipt of disability benefits. While the case was on appeal, the Sixth Circuit issued its decisions in *Blanton* v. *Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith* v. *Wal-Mart Stores,*

Inc., 135 F.3d 376 (6th Cir. 1998), *pet. for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991). In *Blanton*, the Court of Appeals noted its agreement with the D.C. Circuit's decision in *Swanks* v. *Washington Metropolitan Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997), which it viewed as holding that "the receipt of disability benefits does not preclude subsequent ADA relief," and "reject[ing] the doctrine of judicial estoppel, but * * * allow[ing] the consideration of prior sworn statements by the parties as a material factor." 123 F.3d at 917. *Griffith* reiterated that, under *Blanton*, "statements made in an application for Social Security disability benefits, while relevant, do not result in judicial estoppel." 135 F.3d at 382. Instead, the court held, such statements should be "analyzed under traditional summary judgment principles." *Id.* at 383.

Thus, by the time this case was argued in the Sixth Circuit, that court had squarely rejected U-Haul's claim that Kunkle's action was barred by judicial estoppel, and U-Haul recognized at oral argument that Sixth Circuit case law was now against this position. Based on this "concession," the Sixth Circuit found that it "need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is 'otherwise qualified' within the meaning of the ADA." App. 11a. The court did not address U-Haul's argument that, under *Blanton* and *Griffith*, Kunkle's statements concerning his disability were nonetheless pertinent to U-Haul's claim that it was entitled to judgment as a matter of law.

U-Haul's timely petition for rehearing with suggestion for rehearing en banc was denied on November 24, 1998. App. 37a.

REASONS FOR GRANTING THE WRIT

There is no dispute that the issue involved in this case is the subject of substantial conflict among the courts of appeals. As the Solicitor General said in response to this Court's invitation to provide the views of the United

States on the petition in *Cleveland*, "[t]he courts of appeals are in considerable disarray over the impact that an employee's application for or receipt of Social Security disability benefits should have on the employee's claim under the ADA." Brief for the United States as Amicus Curiae at 7-8, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008 (filed July 1998).[1] The Solicitor General noted the existence of at least four different views in the courts of appeals on this issue, *id.* at 8-10, and urged the Court to grant the petition. *Id.* at 7. The Court did just that. The case is now being briefed and has been set for argument on February 24, 1999.

The conflict that will be resolved in *Cleveland* is squarely presented in this case. At each step of the proceedings below, U-Haul asserted that Kunkle was judicially estopped from pursuing his ADA action by the claims of total disability he made when successfully pursuing disability insurance benefits. *See, e.g.*, App. 10a-11a; 17a; 25-26a. U-Haul also claimed that, even if judicial estoppel did not operate as a *per se* bar to Kunkle's action, Kunkle's assertions that he was totally disabled demonstrated U-Haul's entitlement to judgment as a matter of law. *See, e.g.*, Final Brief of Defendant-Appellant at 18-22; Final Reply Brief of Defendant-Appellant at 2-3.[2] While there may be some confusion in the Sixth

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[1] *See, e.g., Rascon* v. *US West Communications, Inc.*, 143 F.3d 1324, 1330-32 (10th Cir. 1998) (recognizing "varying views of other circuits" on ADA judicial estoppel question).

[2] *See also* Final Brief of Defendant-Appellant at 22 ("Regardless of whether one applies the rule that a totally disabled plaintiff is precluded from bringing an ADA claim because as a matter of law he is not a 'qualified individual' or instead applies the rule that representations of disability are merely 'material factors,' it is illogical and inconsistent with all the authorities cited * * * to permit the plaintiff in this case to prevail on these facts."); Petition of U-Haul Co. of Cleveland for Rehearing and Suggestion for Rehearing En Banc ("Reh. Pet.") at 6 (arguing that, while *per se*

Circuit's cases about the weight to be given such claims of disability,[3] there can be no dispute that U-Haul has consistently maintained that Kunkle's admissions—even if not controlling—were entitled to some weight.

It is also clear that the outcome of this case is likely to be affected by the Court's disposition of *Cleveland*. The respondent in *Cleveland* has defended the Fifth Circuit's holding that "the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient is judicially estopped from asserting that he is a 'qualified individual with a disability.'" *Cleveland* v. *Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997) (emphasis in original). *See, e.g.*, Brief in Opposition at 7-8, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008. Petitioner in *Cleveland*, along with the United States and EEOC as amici curiae, have argued against a rebuttable presumption, but recognize that statements concerning disability may be considered as evidence in a subsequent ADA action.[4]

No matter which of these views—or some other view—is adopted in *Cleveland*, the Sixth Circuit's decision will likely have to be reconsidered in light of this Court's guidance on the question. The Sixth Circuit's opinion below rejected application of a *per se* rule of judicial estoppel,

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judicial estoppel was foreclosed by prior Sixth Circuit decisions, "[t]he trial court, and the panel, should * * * have granted U-Haul judgment as a matter of law based upon plaintiff's continued claims of total disability").

[3] *See* Reh. Pet. at 7-8 (discussing various standards articulated in *Blanton*, *Griffith*, and *Keever* v. *City of Middletown*, 145 F.3d 809, 813 (6th Cir.), *cert. denied*, 119 S. Ct. 407 (1998)).

[4] Brief for Petitioner at 18, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008; Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 6, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008.

and—although it did not expressly address the evidentiary effect on an ADA action of prior statements of disability—rejected U-Haul's argument that giving such statements appropriate evidentiary weight required judgment in U-Haul's favor as a matter of law. Once this Court has established the proper evidentiary effect of such statements in *Cleveland*, the Court should dispose of the petition in this case by granting the petition, vacating the decision below, and remanding the case for further consideration in light of the Court's opinion in *Cleveland*.

In the meantime, the Court should defer consideration of this petition. That appears to be the course the Court is following with respect to other petitions that also present the questions at issue in *Cleveland*.[5]

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[5] *See, e.g., Griffith, supra* (cert. petition filed June 9, 1998); *Moore* v. *Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998), *pet. for cert. filed* (U.S. July 20, 1998) (No. 98-5286). *See also Ross* v. *Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001 (7th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 2, 1998) (No. 98-912); *Aldrich* v. *Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 23, 1998) (No. 98-859).

CONCLUSION

For the foregoing reasons, this Court should defer consideration of this petition until it issues its decision in *Cleveland* v. *Policy Management Systems Corp.*, and then dispose of this petition as appropriate in light of that decision.

Respectfully submitted,

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APPENDIX A

[Filed Sep. 16, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

OPINION

Before: SUHRHEINRICH, DAUGHTREY, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Lee Kunkle brought an action against U-Haul Co. of Cleveland ("U-Haul") and certain of its officials and affiliates, alleging that his employment with U-Haul was terminated in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1994) (the "ADA"), and Ohio state law. The matter ultimately proceeded to trial by a jury, which returned a verdict in favor of Kunkle and awarded him $950,000 in damages. The district court entered judgment accordingly, and thereafter denied each of U-Haul's post-

judgment motions. U-Haul now appeals from the judgment asserting that the district court erroneously denied both its motion for judgment as a matter of law, and its motion for a new trial or, in the alternative, remittitur. For the reasons set forth below, we AFFIRM the judgment as entered by the district court.

I. BACKGROUND

Kunkle, who began his employment with U-Haul in 1963, became Shop Manager at U-Haul's truck-repair shop in Akron, Ohio ("the Akron shop") in October of 1990. As Shop Manager, he reported directly to J.P. White, one of U-Haul's officers.

In January of 1994, Kunkle was diagnosed with cancer of the left lung. He was subsequently admitted to Akron City Hospital ("the hospital"), where he underwent surgery for the removal of his left lung on February 11, 1994. On February 24, 1994, Kunkle's wife Betty applied on his behalf for disability benefits with Oxford Life Insurance Company ("Oxford"). Kunkle's surgeon indicated on the application form that Kunkle had been "totally disabled" as of February 7, 1994. Oxford granted the application and began issuing payments in March of 1994. Kunkle also applied for disability insurance benefits with the Social Security Administration ("SSA") on May 21, 1994. He stated in support of the application that he "became unable to work because of [his] disabling condition on February 11, 1994." The SSA granted the application and began issuing payments in August of 1994.

In May of 1994, while Kunkle was recuperating from surgery, White hired Terry Mislevy to replace Kunkle as Shop Manager of the Akron shop. Moreover, White promoted Bill Folk, who had been a mechanic at the Akron shop, to the position of Shop Foreman. At that time, White and Folk agreed that Kunkle would replace Folk as Shop Foreman if Kunkle became well enough to return to work. The U-Haul job description for the position of Shop Foreman provides in relevant part as follows:

PRIMARY FUNCTION: Under the direction of the Shop Manager in a repair location, or other designated supervisor at other repair locations, supervise the profitable operation of all repair activities at the shop. Select, train, supervise shop personnel and maintain cross training program for new personnel. Initiate wage increases, promotions, transfers, disciplinary action and terminations. Ensure that work area is maintained in a clean and orderly manner and that personnel comply with good safety practices and regulation.

. . . .

Physical/Mental Health Requirements: Walking, climbing, stooping, reaching, pushing, talking, depth perception, crawling, crouching, lifting (min. 50lbs.), handling, hearing, standing, kneeling, carrying, digital dexterity, seeing, working speed, balancing, turning, sitting, throwing, feeling, color vision. Mental requirements include, but are not limited to, the ability to concentrate, take initiative, cope with stress, adapt to and stay alert in a business environment, and to use independent judgment to accomplish results.

Kunkle was finally discharged from the hospital on May 24, 1994. He nevertheless remained in serious condition. He was bedridden, required supplemental oxygen, breathed through a trachea tube, and ate through a stomach tube. In August of 1994, he was diagnosed with inoperable cancer in his left chest wall, and subsequently underwent a two-month regimen of outpatient radiation and an intensive three-month cardio-rehabilitative program.

In January of 1995, Kunkle informed White that he was ready to return to work. One week later, Kunkle met personally with White and Mislevy. At the meeting, White mentioned that Kunkle was being considered for a position in Cleveland, Ohio. Kunkle said that he was not

interested in such a position because he did not want to commute to Cleveland.

Kunkle reported back to work on February 15, 1995. This is when he first learned that he would be serving as Shop Foreman rather than as Shop Manager. His salary, however, remained at the level it had been when he was Shop Manager. Despite returning to work, Kunkle continued to receive disability benefits from the SSA under a program allowing recipients to work on a trial basis when there is uncertainty as to whether the recipient has fully recovered and is able to return to permanent employment.

David Bross, who worked at the Akron shop as a repairman, said that he believed that Kunkle was being set up for termination "because he was brought back as a foreman." Bross also testified that he asked Folk why he had not returned his Shop Foreman uniforms after Kunkle replaced him. Folk responded that he was told by Mislevy to keep the uniforms "because he might need them in a month or so."

White testified that Mislevy informed him of several deficiencies in Kunkle's job performance as Shop Foreman. In particular, Mislevy told White that Kunkle was not charging batteries at the Akron's shop's battery-changing station in a timely manner. White elaborated that Kunkle "was using the mechanics who were being paid, you know, a mechanic has to make his time each week, and getting specific jobs done and [Kunkle] was interrupting some of the mechanics because he needed help to lift the batteries for them to be charged." Mislevy, however, did not advise White as to the amount of mechanics' time that had actually been used to assist Kunkle in lifting batteries. Kunkle's testimony indicates that he asked mechanic Andrew Banks for assistance on only two occasions, and asked no other mechanic for such assistance at any time. Banks testified that each occasion on which Kunkle requested his assistance lasted "[a]pproximately

10 to 15 minutes." Kunkle said that before his surgery in February of 1994, batteries were tested, charged, and replaced solely by the mechanics in the Akron shop.

White also testified that Mislevy informed him that Kunkle was not properly ordering parts, thereby delaying truck repair. Mislevy, however, did not specify the number of times that Kunkle improperly ordered parts or the nature of the problem. White further testified about Mislevy's account of instances where Kunkle "was really gasping for breath[.]" Mislevy testified as to one particular instance when Kunkle "looked very pale and had shortness of breadth." Folk testified that Kunkle occasionally "went out to [his] truck to get oxygen."

On March 20, 1995, White terminated Kunkle's employment with U-Haul. White said that he did so because Kunkle "was not physically capable of doing that job." Kunkle testified that he was "almost at a loss for words" when White so informed him, and he repeatedly asked White for the actual reason for his termination. White consistently responded that Kunkle was not physically capable of lifting or moving either batteries or tires, particularly "JH" tires, which weigh approximately 150 lbs. Kunkle, however, repeatedly denied White's assertions to the effect that he was not physically capable of doing the job. Kunkle told White that he had never been asked to move a JH tire.

Later that evening, White telephoned Kunkle at home and simultaneously spoke to Kunkle and his wife, Betty Kunkle. According to Betty Kunkle's testimony, Kunkle repeatedly pressed White for the actual reason for his termination, speculating that it may have been his job performance. White responded by assuring Kunkle that "you did nothing wrong, it's just that you are physically unfit."

Although White testified as to his understanding that Mislevy confronted Kunkle "on at least one or two occasions" regarding deficiencies in Kunkle's job performance,

White did not personally discuss the same with Kunkle before terminating him. Moreover, White issued Kunkle no written reprimand or suspension prior to terminating him, notwithstanding U-Haul's progressive discipline policy of issuing a verbal warning and then a written warning prior to termination. Mislevy confirmed at trial that he prepared no documentation indicating that Kunkle's job performance was deficient. Mislevy also testified that he was not familiar with U-Haul's progressive discipline policy.

In August of 1995, Kunkle filed a three-count complaint against U-Haul and certain of its officials and corporate affiliates. Counts one and two of the complaint set forth claims for employment discrimination under the ADA and Ohio Rev. Code § 4112.02, respectively. Count three set forth a claim for intentional infliction of emotional distress under Ohio law. Each count sought compensatory and punitive damages, among other relief.

In April of 1996, the defendants jointly moved for summary judgment on each count of the complaint. The district court ruled in favor of the individual defendants on all counts, and ruled in favor of the corporate defendants on count three (the claim for intentional infliction of emotional distress), a well as the claims for punitive damages in counts one and two. The matter thereafter proceeded to trial by jury against the corporate defendants on counts one and two.

The jury ultimately returned a verdict in favor of Kunkle and awarded him $950,000 in damages. After the district court entered judgment accordingly, U-Haul brought several post-judgment motions, including a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), and a motion for a new trial or, in the alternative, for remittitur under Fed. R. Civ. P. 59(a) and (e). The district court denied all of U-Haul's motions in an order entered on April 9, 1997. U-Haul now appeals from the judgment, asserting that the district court errone-

ously denied both its motion for judgment as a matter of law, and its motion for a new trial or, in the alternative, remittitur.

II. ANALYSIS

A. U-Haul's Motion for Judgment as a Matter of Law

This court reviews *de novo* the disposition of a motion for judgment as a matter of law. *Cook v. American Steamship Co.*, 53 F.3d 733, 740 (6th Cir. 1995). Such a judgment may be rendered only when no reasonable juror could find in favor of the nonmoving party. *Id.* In reviewing a Rule 50(b) motion, therefore, "we do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury." *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997). Rather, we view the evidence in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences. *Id.*

The ADA provides in relevant part that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the . . . discharge of employees[.]" 42 U.S.C. § 12112(a) (1994). A "disability" within the meaning of § 12112(a) is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102 (2)(A). The term "substantially limits" as it appears in § 12102(2)(A) "means an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population." *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998) (citing 29 C.F.R. § 1630.2(j)(1)). " 'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' " *Cassidy*, 138 F.3d at 633 (quoting 29 C.F.R. § 1630.2(i)).

A "qualified individual with a disability" within the meaning of § 12112(a) is defined as "an individual with

a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). In determining whether a particular employment function is "essential" for purposes of § 12111(8), the following factors may be considered: the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the position; the amount of time spent performing the function; the consequences of not requiring the incumbent to perform the function; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3).

In *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996), this court held that when an employer admits reliance upon a disability in making an adverse employment decision, an employee may establish a *prima facie* case of employment discrimination under the ADA by showing that he or she (1) has a disability, and (2) is "otherwise qualified" for the position. *Id.* at 1186. The burden then shifts to the employer to establish that "a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer." *Id.* The foregoing standard also applies to a *prima facie* case of employment discrimination under Ohio Rev. Code § 4112.02. *See Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F. Supp. 452, 457 n.1 (S.D. Ohio 1997) ("The essential elements of a claim under the ADA and the Ohio handicap discrimination statute are the same. Therefore, the caselaw regarding claims brought under the ADA applies equally to claims brought under the Ohio statute.").

In the present case, White testified at trial that he terminated Kunkle because Kunkle "was not physically capable of doing that job." White's determination that

Kunkle "was not physically capable of doing that job" was based solely on Kunkle's purported inability to lift or carry either batteries or tires, specifically JH tires, which weigh approximately 150 lbs. Although the testimony of White and Mislevy indicated that deficiencies in Kunkle's job performance factored in the decision to terminate him, the jury was entitled to conclude otherwise in light of U-Haul's failure to issue either verbal or written warnings pursuant to its progressive discipline policy and, most significantly, Betty Kunkle's testimony as to White's statement that his termination of Kunkle was unrelated to Kunkle's job performance.

Viewing the evidence in the light most favorable to Kunkle, we are satisfied that Kunkle established a *prima facie* case of employment discrimination under the ADA and Ohio Rev. Code § 411202. First, the testimony at trial revealed that Kunkle experienced difficulty breathing and occasionally went to his truck to retrieve oxygen. Indeed, Kunkle's breathing condition was significant enough that Mislevy felt compelled to inform White about it. Under these circumstances, a reasonable juror could have concluded that Kunkle had a significant breathing restriction as compared to the average individual, a function expressly recognized as a "major life activity" under the ADA. *See* 29 C.F.R. § 1630.2(i). Accordingly, we find that Kunkle met his burden of establishing that he had a disability.

Second, the evidence at trial revealed that while the physical requirements pertaining to the position of Shop Foreman are extensive, the position is essentially supervisory in nature. Although the physical requirements enumerated in U-Haul's job description include "lifting (min. 50 lbs.)," conspicuously absent from the job description is any mention that the position involves *repetitive* lifting or moving of objects weighing 50 lbs., such as batteries, or the lifting or moving of objects weighing three times that amount, such as JH tires. Indeed, the testimony at trial indicates that Kunkle requested assist-

ance with batteries on only two occasions, each of which occupied only ten to fifteen minutes of mechanic Banks's time. Moreover, Kunkle testified that before his surgery in February of 1994, batteries were tested, charged, and replaced solely by the mechanics in the Akron shop.

Based upon the written job description prepared by U-Haul, the relatively brief amount of time Kunkle spent working with batteries, and Kunkle's testimony that he had never been asked to move a JH tire, a reasonable juror could have concluded that the function of lifting and carrying of batteries and JH tires was not "essential" to the position of Shop Foreman. In light of Kunkle's prior work experience as Shop Manager and with the U-Haul organization in general, a reasonable juror could have concluded that he was perfectly capable of performing those functions that were genuinely "essential" to the position of Shop Foreman, even with no accommodation from U-Haul. Accordingly, we are satisfied that Kunkle met his burden of establishing that he was "otherwise qualified" for his position.

Because Kunkle successfully met his burden of establishing that he had a disability and was "otherwise qualified," the burden shifted to U-Haul to establish that the function of lifting and carrying batteries and JH tires was "essential," and therefore a business necessity. *See Monette,* 90 F.3d at 1186. We are satisfied that U-Haul failed in this regard. Our review of the testimonial and documentary evidence introduced at trial indicates that U-Haul put forth virtually no evidence from which a reasonable juror could conclude that the lifting and carrying of batteries and JH tires was "essential" to the position of Shop Foreman, and therefore a business necessity. Accordingly, U-Haul is not entitled to judgment as a matter of law, and the district court properly denied its post-judgment motion for the same.

In so holding, we note that U-Haul initially asserted that Kunkle should have been judicially estopped from

claiming that he is "otherwise qualified" in light of representations that he and his physicians made to the SSA and Oxford regarding his physical condition. U-Haul relied primarily upon *McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3rd Cir. 1996), in which the Third Circuit affirmed a district court's determination that an ADA claimant was judicially estopped from asserting that he was "otherwise qualified" when he had made representations to government agencies "that he is totally disabled and unable to work." *Id.* at 613.

At oral argument, however, U-Haul conceded that its argument concerning the applicability of judicial estoppel in this context has since been foreclosed by this court's decisions in *Blanton v. Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998). Accordingly, we need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is "otherwise qualified" within the meaning of the ADA.

We also note that U-Haul maintains that it is entitled to judgment as a matter of law because Kunkle failed to propose any accommodation, and refused to accept a reasonable accommodation offered by U-Haul in the form of the position in Cleveland, Ohio. We are satisfied, however, that the issue of reasonable accommodation need not be reached in light of our determination that a reasonable juror could have concluded that Kunkle was perfectly capable of performing the "essential functions" of the position of Shop Foreman even without such accommodation.

B. U-Haul's Motion for a New Trial or, in the Alternative, Remittitur

This court reviews for an abuse of discretion the dispositions of a motion for a new trial or, in the alternative, remittitur. *See Strickland v. Owens Corning*, 142 F.3d

353, 358 (6th Cir. 1998). Accordingly, the district court's denial of such a motion must be affirmed unless this court is left with "a definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

U-Haul asserts on appeal that the district court erroneously denied its motion for a new trial or, in the alternative, remittitur. U-Haul argues in support of its position that the jury's verdict in favor of Kunkle was against the great weight of the evidence. Moreover, U-Haul argues that any award of damages was subject to the $100,000 statutory cap as set forth under 42 U.S.C. § 1981a(b)(3)(B) (1994). In addition, U-Haul argues that the $950,000 award of damages was grossly excessive. Finally, U-Haul argues that the jury's verdict was tainted by prejudicial statements made at trial by Kunkle's counsel and several witnesses.

We are satisfied that the district court did not abuse its discretion in denying U-Haul's motion for a new trial or, in the alternative, remittitur. In so ruling, we rely upon the reasons set forth by the district court at pages 10 through 13 of its MEMORANDUM OF OPINION dated April 4, 1997. We believe that a detailed analysis of these issues by this court would be duplicative and would serve no jurisprudential purpose.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment as entered by the district court.

APPENDIX B

[Filed June 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95CV1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

MEMORANDUM OF OPINION

On August 29, 1995, Lee Kunkle, the plaintiff, filed the above captioned case against the U-Haul Systems, Cleveland Rental Equipment Shop, U-Haul Company of Cleveland (collectively, "U-Haul"), J.P. White, Robert A. Miner, and Terry Mislevy ("the individual defendants"), the defendants. He alleges that he was discharged in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Count I) and Ohio Rev. Code § 4112 (Count II). He also alleges intentional infliction of emotional distress (Count III). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343 and 1367.

On April 12, 1996, the defendants filed a motion for summary judgment, and on April 29, 1996, Kunkle responded. For the following reasons, the motion is granted in part, and denied in part.

I.

On May 13, 1963, Kunkle was hired by U-Haul. In October 1990, he began working as shop manager at its truck repair shop in Akron, Ohio. He reported to White, president of the company.

In January 1994, Kunkle was diagnosed with lung cancer. In February 1994, he took a medical leave of absence to undergo surgery, telling White that he expected to be off work for six weeks. After his left lung was removed, he went into a coma and and remained on a respirator for eight weeks. In May 1994, White hired Mislevy to replace Kunkle.

In July 1994, Kunkle was discharged from the hospital. On July 16, 1994, he was awarded $1,088.00 per month of Social Security benefits, which he has received to date.

In August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall. Thereafter, he underwent outpatient radiation treatment for two months. In December 1994, he was discharged from his rehabilitation program at the hospital

In January 1995, White and Mislevy met with Kunkle regarding his return to work. White told him that his doctor would have to approve his return. On January 17, 1995, Dr. Lonsdorf sent a note to White stating that Kunkle is "able to return to work." (Defs. Ex. E.)

On February 13, 1995, Kunkle reported to work as shop foreman, working directly under Mislevy. He was paid the same as when he was shop manager. He alleges that he was able to perform his work. However, on March 20, 1995, he was told he was discharged because he was not "physically capable of handling [his] job." (White Depo at 135.)

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48.

III.

Individuals who are not employers are not personally liable under the ADA. *U.S. Equal Opportunity Comm. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *see Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (citations omitted); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.) *cert. denied*, 115 S.Ct. 574 (1994); *Bremiller v. Cleveland Psychiatric Institute*, 879 F.Supp. 782, 787-88 (N.D. Ohio 1995);[1] *cf. Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 571 N.E.2d 428, (1991).[2] Therefore, Kunkle may not hold the individual defendants liable for employment discrimination. Accordingly, the individual defendants' motion for summary judgment is granted on Counts I and II.

A.

In an employment discrimination claim, the plaintiff bears the burden of proving a prima facie case and rebutting any legitimate, nondiscriminatory explanations proffered by the employer for its actions.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

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[1] Individual defendants are not liable under Title VII or the Age Discrimination in Employment Act.

[2] Individual liability under Ohio Rev. Code § 4112 has been limited to cases of sexual harassment.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 242-53 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).[3] The burden of persuasion always rests on the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

To establish a prima facie case of employment discrimination under the ADA, a plaintiff must prove that he: (1) has a disability; (2) is qualified to perform the essential functions of the job with or without reasonable accommodation; and, (3) has suffered an adverse employment action because of his disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995).

The defendants argue that Kunkle cannot prevail on his claim because, by receiving Social Security benefits while he returned to work, he is estopped from asserting that he was qualified to perform his work. *See Reiff v. Interim Personnel, Inc.*, 906 F.Supp. 1280, 1289-92 (D.Minn. 1995). However, representations by a plaintiff that he is entitled to disability benefits is not dispositive of whether he is not qualified to work. Rather, it is only a factor to consider. *Morton v. GTE North, Inc.*, —— F.Supp. ——, 1996 WL 84830, *11-12 (N.D.Tex. 1996) (citing *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992)). Moreover, Kunkle introduces evidence that he was qualified to return to work, and the Social Seurity Administration permitted him to work on a trial basis while he received benefits. (Pl.'s Ex. 11, 28.)

Kunkle also introduces evidence which, if believed, may establish that he was qualified to perform the essential functions of his job. He had work experience of 30 years without any written disciplinary reports against him.

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[3] Claims brought under Ohio Rev. Code § 4112 prohibiting employment discriminaton should be analyzed in the same manner as claims brought under federal law. *See Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128, 131 (1981).

(Pl.'s Aff. ¶¶ 2-7.) He was recognized for his technical skills. (*Id.* 8-9; Pl.'s Ex. 4, 6; White Depo. at 47.) His doctor approved his return to work after reviewing his job description. (Pl.'s Ex. 11, 12.) He asserts that he never refused to perform his assignments and that all absences were authorized by his supervisors. (Pl.'s Aff. ¶¶ 33, 37.) Therefore, a justiciable issue exists as to whether he was discharged because he was not qualified to perform his work. Accordingly, U-Haul's moton for summary judgment is denied on Counts I and II.

B.

An employer may be liable for punitive damages if it engaged in discriminatory behavior with malice or reckless indifference to its employee's federally protected rights. 42 U.S.C. § 1981a(b)(1). Kunkle introduces evidence that his job description required him to lift heavy tires and that White asked him to see a doctor to determine his fitness for work. This evidence, even if believed, does not amount to malice or reckless indifference to the rights of Kunkle. Therefore, he may not recover punitive damages.[4]

IV.

In Count III, Kunkle charges the defendants with intentional infliction of emotional distress. The standard for intentional infliction of emotional distress in Ohio is set forth in *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 453 N.E.2d 666 (1983). In *Yeager,* the court quoted the Restatement (Second) of Torts § 46(1) (1965):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotion

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[4] Moreover, Kunkle is not entitled to punitive damages under Ohio Rev. Code § 4112.99. *See Hitchings v. Weese,* No. 95-CA-539 (Holmes Cty. App. Dec. 8, 1995) (citing *Hinderegger v. Dairy and Nutrition Council,* No. CA-9297 (Stark Cty. App. Nov. 15, 1993)); *but see Delaney v. Skyline Lodge, Inc.,* 95 Ohio App.3d 264, 269 n.3, 642 N.E.2d 395, 399 (Hamilton Cty. 1994).

> distress to another is subject to liabiilty for such emotional distress. . . .

Yeager, 6 Ohio St.3d at 374, 453 N.E.2d at 671.

The court also defined the terms "extreme and outrageous."

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Yeager, 6 Ohio St.3d at 375, 453 N.E.2d at 671 (quoting Restatement (Second) Torts § 46, cmt. d (1965)). "[P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." *Id.*

The conduct alleged by Kunkle is not "so outrageous . . . as to go beyond all possible bounds of decency." *Id.* In addition, there is not evidence that the defendants acted with the knowledge that his injuries were certain to occur. *See McNeil v. Case Western Reserve Univ.,* 1995 Ohio App. LEXIS 3127 at *7 (Cuyahoga Cty. July 27, 1995) (citing *Fyffe v. Jeno's Inc.,* 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991)). Accordingly, summary judgment is granted on Count III.

V.

In conclusion, the defendants' motion for summary judgment is granted with respect to claims against the individual defendants and Count III.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX C

[Filed June 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95V1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above captioned case this date, the defendants' motion for summary judgment is granted in part and denied in part. Count III is dismissed, and all claims against White, Miner, and Mislevy are dismissed.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX D

[Filed Apr. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95V1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

MEMORANDUM OF OPINION

On August 29, 1995, Lee Kunkle, plaintiff, filed the above-captioned action against U-Haul Systems, Cleveland Rental Equipment Shop, U-Haul Company of Cleveland (collectively "U-Haul"), J.P. White, Robert A. Miner and Terry Mislevy (collectively the "individual defendants"), alleging that he was discharged in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Count One), and Ohio Revised Code ("ORC") § 4112 *et seq.* (Count Two). He also alleged intentional infliction of emotional distress (Count Three).

On June 3, 1996, the Court, in response to a Motion for Summary Judgment, issued a Memorandum of Opinion and Order: (i) dismissing the individual defendants from the action; (ii) denying summary judgment as to

Counts One and Two against U-Haul; and (iii) granting summary judgment as to Count Three (intentional infliction of emotional distress) and punitive damages.

On June 17, 1996, a jury trial commenced. On June 25, 1996, the jury returned a verdict in favor of the plaintiff and awarded damages of $950,000.

On July 10, 1996, U-Haul filed a motion for Judgment as a Matter of Law ("Motion for Judgment"), a Motion to Amend"), and a Motion for New Trial or Remittitur ("Motion for New Trial/Remittitur"). On July 23, 1996, the plaintiff responded to all motions. Both parties have since filed supplemental briefs.

For the following reasons, all motions are hereby DENIED.

I. FACTS

A. Trial Testimony

The following evidence was presented at trial:

Kunkle began working for U-Haul in May of 1963. (Tr. at 47.) Throughout his thirty year employment, he held a number of positions in both the manufacturing and retail divisions of the company (Tr. at 47-53.) On October 1, 1990, he was promoted to Shop Manager of the Truck Repair Shop ("Repair Shop") in Akron, Ohio. (Tr. at 51-52.) He reported directly to J.P. White, President of U-Haul Company of Cleveland.[1] (Tr. at 36, 44.)

In January 1994, Kunkle was diagnosed with lung cancer. (Tr. at 279-80.) He was referred to a cario-

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[1] U-Haul Company of Cleveland is a wholly-owned subsidiary of U-Haul International, which, in turn, is held by the holding company Americo. (Tr. at 36.) At trial, White testified that he had never heard of "U-Haul Systems" or the "Cleveland Rental Equipment Shop," both of whom were named as defendants in this action. (Tr. at 36-37.) On June 19, 1996, Kunkle filed a motion to add U-Haul International as a defendant, arguing that U-Haul Systems and U-Haul International were synonymous. On June 24, 1996, the

thoracic surgeon for immediate surgery. (*Id.*) He informed White of his condition and indicated that he would be out six weeks. (Tr. at 61.) In his absence, Rudy Lazlo and Bill Folk were temporarily assigned to perform his duties. (Tr. at 61.) White assured him that his job would be held open until his return. (Tr. at 65.)

On February 11, 1994, Kunkle was admitted to Akron City Hospital for surgery. (Tr. at 281.) After his left lung was removed, he lapsed into a coma and remained on a respirator for eight weeks. (Tr. at 283-84.) He was diagnosed with adult respiratory distress syndrome and had only a 5% chance of survival. (Tr. at 285.)

In May 1994, White hired Terry Mislevy to replace Kunkle as Shop Manager for the Repair Shop. (Tr. at 67.) Despite his eighteen years of service with U-Haul, Mislevy had no experience within the manufacturing division. (Tr. at 68.) Thus, White created the position of Shop Foreman and promoted Bill Folk, formerly a mechanic.[2] (Tr. at 67.) Folk agreed that if Kunkle recovered and returned to work, he would relinquish his position and resume working as a mechanic. (Tr. at 69.)

Kunkle eventually awoke from the coma and began to improve. (Tr. at 417.) In May 1994, he was discharged from the hosiptal and taken home. (*Id.*) His physical condition, however, was still serious; he had lost more than sixty pounds and was totally bed-ridden. (Tr. at

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Court, after hearing arguments of counsel, denied the motion. (Tr. at 637-40.) Thus, U-Haul Company of Cleveland is the only defendant properly before this Court.

[2] The position of Shop Foreman required significantly more physical exertion than that of Shop Manager. (Tr. at 675.) The Shop Foreman was responsible for the operation of the repair floor, supervising mechanics, assigning work, performing both pre- and post-inspections of the trucks (which entailed crawling under and on top of the trucks), refueling the trucks, and operating the battery charging station. (Tr. at 106-07.) The Shop Manager position, in contrast, largely consisted of paperwork, computer work, and restocking parts. (Tr. at 674.)

417-18.) He required supplemental oxygen, was breathing through a trachea, and ate through a tube in his stomach. (Tr. at 417-18.)

In August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall. (Tr. at 287.) He underwent outpatient radiation treatment for two months. (Tr. at 288.) He also participated in a cardio-rehabilitative program at Akron General Medical Center and began to gradually improve. (*Id.*) On December 30, 1994, he was discharged from the program. (Tr. at 290.)

On January 10, 1995, Kunkle told White that he was ready to return to work. (Tr. at 492.) One week later, Kunkle met White and Mislevy at a Denny's Restaurant. (Tr. at 72.) White informed him that U-Haul needed a doctor's release before he could return to work. (*Id.*) White testified that at this meeting he indicated that Kunkle would be returning as Shop Foreman rather than as Shop Manager. (*Id.*) Kunkle denies that this was discussed. (Tr. at 494.)

On February 13, 1995, after procuring a note from Dr. Kevin Lonsdorf, his family physician, Kunkle reported to work. (Tr. at 293, 502.) He claims that Mislevy informed him, for the first time, that he was to be Shop Foreman. (Tr. 503.) He was paid the same as when he was Shop Manager.(Tr. at 72.)

Kunkle testified that he was able to perform the duties of Shop Foreman, but acknowledged that he needed assistance operating the battery charging station. (Tr. at 514.) White, in turn, testified that Kunkle had not adequately performed his job duties. (Tr. at 94-99.) On March 20, 1995, White discharged Kunkle, claiming that he "was not physically capable of doing [the] job." (Tr. at 101.)

B. The Verdict

On June 17, 1996, a jury trial commenced. After hearing the evidence, the jury found that Kunkle had been

discharged because of his disability and awarded him $950,000 in damages.

I.

A. Motion for Judgment as a Matter of Law [3]

U-Haul first moves for judgment as a matter of law, arguing that (1) Kunkle is estopped from claiming to be a "qualified individual with a disability," and (2) Kunkle did not provide any evidence of discrimination. The Court finds that neither argument has merit.

As the primary basis for its motion, U-Haul resurrects the argument that Kunkle is estopped from being a "qualified individual with a disability" by statements that he and his physician made to the Social Security Administration and his private insurance carrier.[4] This theory was first raised in U-Haul's pretrial Motion for Summary Judgment. The Court, after careful consideration, refused to apply estoppel under the facts of the case. *See* June 3, 1996 Memorandum of Opinion, Docket No. 97, at 6. To the extent that U-Haul has merely re-stated its earlier argument, the Court declines to revisit the issue and stands by its prior ruling.

U-Haul, however, argues that Dr. Lonsdorf's testimony at trial, evidence not previously before the Court, lends

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[3] When ruling on a motion for judgment as a matter of law, a court "should not weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury; rather, it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Black v. Ryder*, 15 F.3d 573, 583 (6th Cir. 1994).

[4] In order to receive Social Security and private disability benefits, Kunkle and his physican, Dr. Kevin Lonsdorf, certified on several occasions that he was "totally disabled," *i.e.*, incapable of working. U-Haul argues that, based upon these earlier statements, Kunkle cannot now claim to be "otherwise qualified," *i.e.*, capable of working. The Court rejected application of this theory in its earlier Memorandum of Opinion. *See* June 3, 1996 Memorandum of Opinion, Docket No. 97, at 6.

further support for application of estoppel principles. At trial, the following exchange occurred:

> Q: So in your opinion on April 28, 1995, as you related to Oxford Insurance Company, Mr. Kunkle was totally disabled with respect to performing any other work, is that correct?
>
> A: Correct.
>
> Q: Is that still your opinion today?
>
> A: Yes.

(Tr. at 340.) U-Haul claims the above testimony represents an admission by Dr. Lonsdorf that Kunkle is totally disabled and, as such, he cannot be considered a "qualified individual" for purposes of the ADA and ORC § 4112.

The Court does not agree. Careful examination of Dr. Lonsdorf's testimony, when viewed in its entirety, shows that the doctor believed Kunkle could perform all duties of Shop Foreman with the exception of the battery charging station.[5] (Tr. at 343.) Dr. Lonsdorf concluded that Kunkle was "disabled" only after learning of the lifting involved in operating the battery station; thus, had U-Haul assigned that responsibility to another employee (or allowed Kunkle to request assistance), Dr. Lonsdorf clearly believed Kunkle could perform as Shop Foreman. Moreover, Dr. Lonsdorf later clarified that when he characterized Kunkle as "disabled," he was referring only to Kunkle's ability (or inability) to act as Shop Foreman for U-Haul, not his capacity ability to perform any work. (*Id.*) Accordingly, the Court concludes that Kunkle is not estopped from claiming to be a "qualfied indivdual with a disability."[6]

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[5] Dr. Lonsdorf cautioned that Kunkle could not engage in heavy or repetitive lifting. (Tr. at 343.) However, other than with respect to the batery station, the duties of Shop Foreman did not require this type of activity on a regular basis.

[6] U-Haul also argues that because Kunkle acknowledged that he could not operate the battery station without assistance, he is now

As a second basis for its motion, U-Haul argues that Kunkle did not provide any evidence of discriminatory intent. However, viewing the evidence in the light most favorable to Kunkle, *see supra* n.3, sufficient evidence exists to support the jury's verdict. The jury could have reasonably concluded that Kunkle could perform all job responsibilities of Shop Foreman with the exception of the battery station; the battery station was not an "essential function" of the job; and that U-Haul refused him the "reasonable accommodation" of requesting assistance when operating the station, thereby violating the law.[7]

Accordingly, U-Haul's Motion for Judgment as a Matter of Law is DENIED.

B. Motion to Amend

Noting that reinstatement is the preferred remedy in employment discrimination cases, *see Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir.), *cert. denied*, 116 S.Ct. 77 (1995), U-Haul next moves the Court to amend the judgment by ordering the reinstatement of Kunkle in lieu of front pay damages presumably awarded by the jury.

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estopped from claiming to be "qualified" for the position. However, the jury could have reasonably concluded that operating the station was not an "essential function" of the job; thus, had U-Haul offered a "reasonable accommodation," *e.g.*, assigning the station to another employee or allowing Kunkle to request assistance, he could have performed the functions of Shop Foreman.

[7] The jury also may have questioned U-Haul's decision to reinstate Kunkle as Shop Foreman, a position that was more physically demanding than his prior experience as Shop Manager. David Bross, an employee at the Repair Shop, testified that he thought Kunkle was "doomed from the getgo" and "being set up for termination" due to the intense physical labor required as Shop Foreman. (Tr. at 268-69.) There was also evidence that, upon Kunkle's return, Mislevy instructed Folk to keep his Shop Foreman uniform because he may need it in a month. (Tr. at 265.)

The analysis of this issue is complicated by two factors: (1) prior to charging the jury, the Court did not articulate its reasons for determining that front pay was an appropriate remedy, *see Roush v. KFC Nat'l Mgmt. Co.*, 10 F.3d 392, 398-99 (6th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994); and (2) the submitted verdict form did not require the jury to identify which portion of its award (if any) represented front pay.

"[A]n award of front pay must be governed by the sound discretion of the trial court." *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984). The propriety of a front pay award is a matter of law for the Court; the amount of such award is a question of fact for the jury. *Roush*, 10 F.3d at 398. While reinstatement is the "presumptively favored equitable remedy" in employment discrimination cases, it is not appropriate in every case. *Id.* at 398. Prior to submitting the issue of damages to the jury, a court should determine whether, after considering relevant and equitable factors, reinstatement or front pay would be a more appropriate remedy in the event the plaintiff prevails.[8] *Id.* at 398-99.

The Court did not articulate, in advance of submitting the case to the jury, whether it deemed an award of front pay to be appropriate. Nevertheless, the jury was properly instructed on the factors to be considered in determining the amount of front pay. *See Roush*, 10 F.3d at 398-99 ("This case highlights the most obvious reason why [a court should articulate its reasons that front pay is appropriate]: because the jury must be instructed on what factors to consider in determining the amount of front pay. . . .") The Court, in its jury instructions, explained "an employee's duty to mitigate . . . the employee's work

[8] For instance, the *Roush* court identified several instances where reinstatement would be inappropriate where the plaintiff has found other work, where it would result in the displacement of a nonculpable employee, or where hostility would result. *Id.*

and life expectancy, [and] the discount tables to determine the present value of future damages," all factors to be considered in awarding front pay.[9] *Id.* at 399.

The evidence at trial clearly supports the decision to instruct the jury on front pay. Kunkle testified that he could perform the duties of Shop Foreman, but acknowledged he needed assistance in operating the battery charging station. (Tr. at 504-14.) U-Haul took the position that its mechanics, who were paid on a per-task basis, could not afford to offer such assistance to Kunkle. (*See, e.g.*, Tr. at 94-95.) Thus, assuming that Kunkle was "otherwise qualified" to perform his position (as the jury so found), U-Haul apparently cannot offer the "reasonable accommodation" he needs in order to perform the duties of Shop Foreman. Under such circumstances, reinstatement would not be appropriate.[10]

Despite the opportunity to comment upon the jury instructions, U-Haul did not object to that portion of the charge dealing with front pay. (*See* Tr. at 705-12.) If, as U-Haul now alleges, it was "ready to offer unconditional reinstatement" should plaintiff prove successful, it was under an affirmative obligation to bring the matter to the

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[9] The instructions did not expressly address "the availability of employment opportunities and the period within which one, by reasonable efforts, may be reemployed," *see id.*; however, evidence regarding these matter was presented at trial and the jury presumably considered such factors in reaching its verdict.

[10] Evidence of animus against Kunkle was also adduced at trial. Kenneth Dulaney, a former U-Haul employee, related the substance of a conversation he had with Folk during an encounter at a local store. During this conversation, Folk claimed he would intentionally turn off the overhead exhaust fans in the shop in order to make it more difficult for Kunkle to breathe. (Tr. at 247.) Were Kunkle reinstated as Shop Foreman, he would replace Folk and thereafter act as his supervisor. The potential for hostility between these parties is a significant factor rendering reinstatement inappropriate. *See Roush*, 10 F.3d at 398.

Court's attention *at that time*, particularly when it had notice that the Court intended to charge front pay. (Motion to Amend at 2.) Moreover, U-Haul did not object to that portion of the Form of Verdict in which the jury was asked to return a general damages award.[11] Even were the Court now inclined to order reinstatement, U-Haul has not explained the method by which the Court may derive that portion of the $950,000 that represents front pay such as to properly remit the verdict.[12]

To amend the judgment at this stage would neither be proper nor feasible. Accordingly, the Motion to Amend is DENIED.

C. Motion for New Trial of Remittitur [13]

U-Haul finally moves the Court to grant a new trial or, alternatively, to remit the amount of the verdict, arguing: (1) the damage award was grossly excessive; (2) im-

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[11] Jury Interrogatory No. 4 asked: What amount of damages did the plaintiff sustain as a result of the conduct of the defendants? $_____

While U-Haul did not object to this portion of the Form of Verdict, Kunkle requested that the question be amended to require the jury to identify the various portions of its award (e.g., back-pay, front pay, compensatory damages). (Tr. at 754.) Unfortunately, Kunkle based his request over concern that the defendants would file post-judgment motions arguing the award was excessive. (*Id.*) No mention of reinstatement or front pay was raised. Had the Court been made aware of this issue, it would have been more inclined to modify the Form of Verdict in the manner suggested by Kunkle.

[12] Dr. Harvey Rosen, an economist, testified that Kunkle's future earnings loss, reduced to present value, was between $227,631 and $411,116. (Tr. at 364.) The Court has no method of determining which of these figures (if any) the jury relied upon in reaching its verdict and presumably awarding front pay.

[13] In ruling on a motion for a new trial, a court has wide discretion; it may consider the credibility of witnesses and weigh the evidence. *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 403 (D.N.J. 1996).

proper statements by plaintiff's counsel inflamed and prejudiced the jury; and (3) the verdict was against the manifest weight of the evidence. The Court again finds that none of the arguments have merit.

U-Haul first argues that the $950,000 award was grossly excessive. It claims that pursuant to 42 U.S.C. § 1981a (3)(B), compensatory damages against a company of its size for violations of federal anti-discrimination laws are capped at $100,000.[14] Because the jury did not identify the various portions of its award such that the cap may be applied, *see supra* n.11, U-Haul requests the Court to order a new trial or reduce the award by $600,000-$700,000.

At no time prior to the verdict did U-Haul bring to the Court's attention that the statutory caps contained in 42 U.S.C. § 1981a(b)(3) were an issue in this case.[15] U-Haul did not object to the Form of Verdict in which the jury was asked to return a general damages award. *See supra* n.11. Thus, to the extent U-Haul argues that a

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[14] 42 U.S.C. § 1981a(b)(3) provides:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000. . . .

U-Haul has had more than 100 but less than 201 employees at all relevant times such as to qualify for the cap. *See* Affidavit of White, attached to Motion for New Trial/Remittitur as Exhibit A, at ¶¶ 3-5.

[15] Indeed, the issue was not raised until U-Haul, after retaining additional counsel, filed these post-judgment motions.

new trial must be granted because the statutory cap cannot be applied, it brought the situation upon itself.[16]

More importantly, the jury was charged under both the ADA and Ohio's anti-discrimination statute, ORC § 4112 *et seq.* Ohio law does not contain the statutory cap (or any analogous damages limitation) now relied upon by U-Haul. While the Supreme Court of Ohio has held that ORC § 4112 should be interpreted to parallel federal legislation, *see Plumbers & Steamfitters Comm. v. O.C.R.C.*, 421 N.E.2d 128, 131 (Ohio 1981), such interpretation does not extend so far as to engraft a federal statutory cap upon a state cause of action. Thus, the Court finds that even assuming the cap applies to Kunkle's claim under the ADA, it does not extend to his claim brought under ORC § 4112, and U-Haul is not entitled to a new trial or remittitur based upon this issue.[17]

U-Haul next takes issue with two comments made by plaintiff's counsel in the opening and closing arguments, contending that they were improper, misleading, and calculated to inflame the passion and prejudice of the jury. In his opening, plaintiff's counsel stated: "There will be testimony and there will be people who will raise their hand to God and look you in the eye and lie like a

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[16] Whether U-Haul can be deemed to have waived the statutory cap contained in 42 U.S.C. § 1981a(b)(3) is an issue the Court need not address due to the state law issue.

[17] The Court also disagrees with U-Haul's more general argument that, irrespective of the statutory cap, the damage award was excessive. While the amount of the award is clearly significant, Dr. Harvey Rosen, an economist, testified that Kunkle's combined economic losses (backpay and front pay) alone were between $297,731 and $481,216. (Tr. at 364.) Assuming the jury was guided by the larger figure, more than half of its verdict represents an equitable amount designed to "make the plaintiff whole," without consideration of pain, suffering, inconvenience or other compensatory damages. The Court concludes that the verdict is not so excessive as to require a new trial or remittitur.

bandit."[18] (Tr. at 23.) The second comment occurred during closing remarks, when counsel stated:

> Now, we know that Mr. White had promised to bring Mr. Kunkle back in that job. This job had been kept open as shop manager. They had to bring him back, no question about it. Their own policy and procedure basically says this, and Mr. White's own words when Mr. Kunkle went out, they had to bring him back.
>
> For opposing counsel to suggest, why would they bring him back and then get rid of him, he brought him back because he had no choice. He had to.

(Tr. at 748.)

U-Haul did not object timely to either comment,[19] and by so doing waived any objection unless the comments constituted plain error or a defect affecting substantial rights. *United States v. August*, 984 F.2d 705, 714 (6th Cir. 1992), *cert. denied*, 510 U.S. 854 (1993). The remarks in opening, while perhaps ill-advised, were nonetheless innocuous at best.[20] *See supra* n.18. Similarly,

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[18] Interesting, plaintiff's counsel did not indicate which side's witnesses would so act. He continued: "You have to sort through that and determine what you believe the evidence and the facts, the true facts support." (*Id.*) U-Haul does not explain how this comment prejudiced the jury, but argues that the comment was designed to "incite the jury's passion and sympathy for Mr. Kunkle." *Motion for New Trial/Remittitur* at 12.

[19] At the conclusion of closing arguments, at a conference in chambers, U-Haul expressed concern over counsel's closing comments and requested a curative instruction. (Tr. at 755.) The Court declined to issue an instruction, noting that U-Haul had not timely objected. (*Id.* at 755-56.)

[20] This finding likewise applies to the remarks of Betty Kunkle. When asked about Kunkle's physical progress after being released from the hospital, she replied: "He was determined to get better and I was determined to help him. We are a family of faith and we prayed and prayed while he was in intensive care. We had

even assuming that counsel's comments during closing were improper, the potential that such remarks caused juror prejudice or confusion is not so great as to warrant the granting of a new trial. *Id.*

Finally, U-Haul argues that the Court should grant a new trial because the verdict was against the manifest weight of the evidence. For the reasons expressed by the Court in denying the Motion for Judgment as a Matter of Law, *see supra* at 7, this argument is rejected.

Accordingly, the Motion for a NewTrial/Remittitur is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

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found a verse in the Bible that said that 'if you have faith as small as a mustard seed nothing is impossible.' Matthew 17:20. And that got us through it and we knew nothing was impossible; that he was going to make it." (Tr. at 415-16.) U-Haul cites this testimony to argue that the trial was "rife with unfairly prejudicial and extraneous testimony." *Motion for New Trial/Remittitur* at 14. What U-Haul neglects to note, however, is that it did not object to the testimony. Even were the Court to assume that the comment was somehow prejudicial, it clearly did not rise to the level of plain error. *See August*, 984 F.2d at 714.

APPENDIX E

[Filed Apr. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95CV1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motion for Judgment as a Matter of Law is DENIED; the Motion to Amend is DENIED; and the motion for a New Trial/Remittitur is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX F

[Filed Nov. 24, 1998]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

ORDER

Upon consideration of the appellant's motion to hold the decision on its petition for rehearing en banc in abeyance pending the Supreme Court's decision in *Cleveland v. Policy Management Systems Corp., et al.*, No. 97-1008 (5th Circuit),

It is ORDERED that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX G

[Filed Nov. 24, 1998]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

ORDER

BEFORE: SUHRHEINRICH, DAUGHTREY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Judges Nelson and Moore recused themselves from participation in this ruling.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX H

STATUTORY PROVISIONS INVOLVED

SOCIAL SECURITY ACT

42 U.S.C. § 423(d)(1), (2)

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work

which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12102(2)

§ 12102. Definitions

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(8)

§ 12111. Definitions

As used in this subchapter:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12112(a)

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(2)

Supreme Court, U.S.
FILED
FEB 4 1999
CLERK

No. 98–1097

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

U-HAUL CO. OF CLEVELAND,

Petitioner,

v.

LEE KUNKLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §422(c) and 20 C.F.R. §404.1592(a) are reproduced in the Appendix hereto. 42 U.S.C. §§423(d)(2)(A) and 12111(8) are reproduced in Petitioner's Appendix H to I.

STATEMENT OF THE CASE

Respondent Lee Kunkle started working for Petitioner U-Haul in 1963, and by 1990 he had worked his way up through the job of foreman, all the way up to shop manager. *See* Petitioner's App. 2a. In February 1994, however, Respondent developed lung cancer, underwent surgery, and had a lung removed. He then went into a coma, and lay on a respirator for two months. During this period, Kunkle's wife applied for disability benefits from Oxford Life. Petitioner's App. 2a. Kunkle's prognosis at that point was "extremely poor. Ninety-five percent . . . of patients in that situation die." Ct. App. Jt. App. p. 279, Tr. 25 (Dr. Lonsdorf).

Mr. Kunkle emerged from the coma. However, the cancer reappeared in August. By the end of September, Kunkle had completed the radiation treatment necessitated by this setback. Petitioner's App. 3a. In the interim, he applied for social security disability benefits (May) and started receiving them (August). Petitioner's App. 2a.

Throughout the entire period of Respondent's illness, Mr. White at U-Haul repeatedly promised him and his wife that Mr. Kunkle could return to work whenever he was able. Ct. App. Jt. App. pp. 465-66, Tr. 64-65 (White), Ct. App. Jt. App. P. 568, Tr. 427 (Mrs. Kunkle).[1]

By February, Kunkle's rehabilitation was complete and he was raring to take White up on his promise and return to

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[1] Also, the company policy allowed a one-year medical leave. Ct. App. Jt. App. pp. 451, 53, 54, Tr. 39-41 (white).

work. *See* Ct. App. Jt. App. p. 530, Tr. 290. Accordingly, Oxford Life stopped his disability benefits; and Social Security, while continuing his benefits, switched him over to its trial work program. *See* Petitioner's App. 4a.

In Kunkle's absence, Petitioner had hired Terry Mislevy to replace Respondent as shop manager. Petitioner had also William Folk as shop foreman, with the understanding that Kunkle would bump him down if and when Kunkle ever returned to work. Petitioner's App. 2a. (But see Petitioner's App. 5a: Instead of bringing Kunkle back as manager, Petitioner brought him back to the more physically demanding job of foreman in order to "set [him] up for termination." In fact, when Kunkle returned, Mislevy instructed Folk to keep his shop foreman's uniform; Folk might need it in a month.)

Thus, when Kunkle returned to work on February 15, 1995, he returned as shop foreman, albeit at his previous rate of pay. Petitioner's App. 4a. The shop foreman's job was more physical, requiring, according to the job description, lifting minimum 50 pounds. Petitioner's App. 3a.

Five weeks later, on March 20, 1995, Mr. White fired Mr. Kunkle. White articulated what he repeatedly insisted was the sole reason for the discharge: Kunkle was not physically capable of moving batteries, and he was not physically capable of moving tires, particularly "JH" tires that weighed 150 pounds. Petitioner's App. 5a.

Kunkle was dumbfounded. The foreman's job did not require, nor had anyone ever asked him to move a tire. Petitioner's App. 9-10a. True, if the job had required it, Kunkle — with only one lung — could not have lifted it singlehandedly. But each tire weighed 150 pounds. So no one could lift a tire singlehandedly! (See Ct. App. Jt. App. p. 575, Tr. 447, where Mrs. Kunkle recounted asking White

if *he* could lift a tire. When White said no, Mrs. Kunkle suggested that *he* go on disability.)

White's battery charge (!) requires more explanation. Previously, batteries had been charged with portable chargers. Under a new system, instituted while Kunkle was on medical leave, batteries would be brought to a central battery charging station. Petitioner's App. 10a.

Thus, under the new procedure, the job of job foreman entailed moving batteries. But over the five weeks Kunkle was back at work, batteries needed to be moved only once or twice. And Kunkle was able to do it, with Mr. Banks' help — it only took 10-15 minutes of Banks' time. Petitioner's App. 9-10a.

Respondent thus protested that he was physically able to perform the essential duties of his job, albeit that he needed minor accommodation to lift batteries. When his protests proved ineffective to win his job back, he filed a lawsuit alleging he was discharged in violation of the Americans with Disabilities Act and comparable Ohio law, and alleging also intentional infliction of emotional distress.

Respondent moved for summary judgment. The trial court granted the motion as to intentional infliction of emotional distress but overruled it as to Kunkle's other two claims. Petitioner's App. 13a-19a.

The case then went to trial, and the jury returned a verdict in Kunkle's favor for $950,000. The trial court overruled U-Haul's post-trial motion for judgment as a matter of law. (Petitioner's App. 35a), and U-Haul appealed to the Sixth Circuit. The Sixth Circuit affirmed (Petitioner's App.1a-12a) and subsequently denied U-Haul's petition for rehearing with suggestion for rehearing en banc. Petitioner's App. 37a.

REASONS AGAINST GRANTING THE WRIT

I. This Is Not Even A Judicial Estoppel Case

A person is "disabled" under the Social Security Act if he "cannot engage in *any* . . . kind of substantial gainful work . . ." 42 U.S.C. §423(d)(2)(A) (emphasis added). A "qualified individual with a disability" under the Americans with Disabilities Act, in contrast, is "an individual with a disability who, with or without reasonable accommodation, can perform the essential function of the employment position that such individual holds . . ." 42 U.S.C. §12111(8). The judicial estoppel issue arises in cases like *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, because it can be inconsistent for a disabled person to represent that he *can* perform the essential functions of his position, for purposes of the ADA, if he has previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability program.

This court has granted certiorari in the *Cleveland* case. According to petitioner U-Haul, this court should also grant certiorari here because "this case presents the same issues." Petition, pp. 2-3.

In fact, however, respondent Kunkle did not make the kinds of contradictory representations about his disability that were at issue in *Cleveland*. Therefore this Court should not grant certiorari here.

Lee Kunkle's wife applied for private disability insurance benefits on Lee's behalf in February of 1994; Lee himself was lying in a two-month long coma after losing one lung to lung cancer. Those benefits began in March of 1994. In July, Kunkle's application for Social Security disability benefits was approved. In August, his cancer recurred, and he started radiation treatments. He continued receiving both

private disability and Social Security disability benefit until mid-February, 1995, when he recovered to the degree that he could return to work. At that point, his private disability insurance stopped; and while his Social Security benefits continued, they did so under Social Security's "trial work" program.

Carolyn Cleveland's case was very different. She applied for Social Security disability benefits representing that she was totally disabled as of January 7, 1994. Even when she returned to work in April of 1994, she never withdrew her application or otherwise indicated to the Social Security Administration (SSA) that she was anything other than totally disabled and unable to work. Under those circumstances, the Fifth Circuit determined that she was estopped from asserting that she was a qualified individual with a disability under the ADA when she was fired in July of 1994. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997).

What distinguishes Kunkle's case from Cleveland's is the fact that once Kunkle recovered to the point in February 1995, that he could return to work, he told the SSA so. The SSA itself then switched Kunkle to the "trial work" program under 42 U.S.C. §422(c) and 20 C.F.R. §404.1592(a).

Receipt of benefits under the trial work program — unlike receipt of Social Security disability benefits otherwise — does *not* require an individual to be unable to work in order to qualify as disabled (*Cleveland*, *supra*, at 518); and it would materially threaten the "policy concerns and implications" of the trial work program to bar a worker who receives benefits under this program from seeking the protection of the ADA. *See Marrello v. Chemical Bank*, 923 F. Supp. 487, 492 (S.D.N.Y. 1996). The representations that individual makes to qualify under the trial work program — disabled, but able

to work — thus do not, and should not, estop him from claiming he is a "qualified individual with a disability" under the ADA. *See also, e.g., Griffin v. Wal-Mart Stores*, 135 F. 3d 376, 382 (6th Cir. 1998) (also distinguishing the trial work program).

This is thus not a case like *Cleveland*. Ms. Cleveland's representations of total inability to work on account of her disability, made to the SSA, were totally at odds with her representations, made under the ADA, that she was able to work despite her disability. These inconsistencies in Ms. Cleveland's representations made *Cleveland* ripe for a grant of Certiorari, so this court can refine the role judicial estoppel should play in ADA eligibility. But there are no analogous inconsistencies here. Therefore, whereas it made sense to grant certiorari in *Cleveland*, it would add nothing to the debate over judicial estoppel's role in ADA eligibility to grant certiorari in this case.

II. Petitioner Waived Judicial Estoppel

U-Haul is petitioning for certiorari on the judicial estoppel issue. In fact, however, Petitioner waived this issue during oral argument before the Sixth Circuit.

In the course of upholding the lower court's denial of judgment as a matter of law, the Sixth Circuit recounted this waiver as follows:

> "[U]Haul is not entitled to judgment as a matter of law, and the district court properly denied its post-judgment motion for the same.
>
> In so holding, we note that U-Haul initially asserted that Kunkle should have been judicially estopped from claiming that he is "otherwise qualified" in light of representations that he and

> his physicians made to the SSA and Oxford [Insurance Company] regarding his physical condition . . . At oral argument, however, U-Haul conceded that its argument concerning the applicability of judicial estoppel in this context has been foreclosed by this court's decisions in *Blanton v. Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), Supplementing 108 F. 3d 104 (6th Cir. 1997), and *Griffith v. Wal-Mart Stores, Inc.*, 135 F. 3d 376 (6th Cir. 1998). Accordingiy, we need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is "otherwise qualified" within the meaning of the ADA."

U-Haul should not be permitted to resurrect, here upon petition for certiorari, an issue it waived below.

U-Haul argues, however, that it waived only judicial estoppel *per se*, and that it did not intend to waive its argument that Kunkel's representations of disability to the SSA was evidence entitling U-Haul to judgment as a matter of law. But even if judicial estoppel could be subdivided into two arguments (i.e., judicial estoppel *per se vs.* representations of disability entitling U-Haul to judgment as a matter of law) so that a waiver somehow applied to one argument but not the other, the supposed distinctions between the two arguments are distinctions without a difference in this case. For it is clear that the Sixth Circuit did factor in Kunkle's representations of disability, along with all the other

evidence, when it considered whether U-Haul was entitled to judgment as a matter of law.[2]

Judgment as a matter of law "may be rendered only when no reasonable juror could find in favor of the non-moving party." *See* Petitioner's App., 7a. Here, in contrast, a reasonable juror *could* find in Kunkle's favor. On one hand, U-Haul presented evidence of Kunkle's representations to the SSA to establish that Kunkle could not have been a qualified individual under the ADA. But on the other hand, Kunkle countered this evidence with evidence establishing that Kunkle was a qualified individual under the ADA.

A reasonable juror was entitled to conclude from Kunkle's evidence, and despite U-Haul's evidence, that Kunkle was indeed "perfectly capable of performing" despite having a "disability" under the ADA. Petitioner's App. 10a, 9a. And therefore, the trial court and the Sixth Circuit properly overruled U-Haul's motion for judgment as a matter of law.

Thus there was no misinterpretation of the scope of petitioner's waiver which justifies relief here.

To the contrary — U-Haul waived the issue; U-Haul intended to waive the issue; the panel interpreted the scope of the waiver correctly; and the court, in denying U-Haul's

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[2] See the Sixth Circuit's Order of November 24, 1998, denying U-Haul's petition for rehearing, Petitioner's App. 37a. U-Haul had petitioned for rehearing on the grounds that the Sixth Circuit had misinterpreted the scope of its waiver, i.e., that U-Haul meant only to waive judicial estoppel *per se* and not whether Kunkle's prior representations of disability entitled U-Haul to judgment as a matter of law. The Sixth Circuit denied the motion, "conclud(ing) that the issues raised on the petition were fully considered upon the original submission and decision of the case."

Petitioner for Rehearing, impliedly agreed that the panel had interpreted the scope of the waiver correctly. Accordingly, the issue of judicial estoppel must be deemed waived here upon petition for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny U-Haul's Petition for a Writ of Certiorari.

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SOCIAL SECURITY ACT
42 USCS §422(c)

"Period of trial work" defined.

(1) The term "period of trial work," with respect to an individual entitled to benefits under section 223, 202(d), 202(e) or 202(f) [42 USCS §423, 402(d), (e), or (f)], means a period of months beginning and ending as provided in paragraphs (3) and (4).

(2) For purposes of sections 216(i) and 223 [42 USCS §§416(i), 423], any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type of normally performed for remuneration or gain.

(3) A period of trial work for any individual shall begin with the month in which becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 202(d) [42 USCS §402(d)] who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 202(e) or (f) [42 USCS §402(e), or (f)] who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work may begin for any individual prior to the beginning of the month following the month in which this paragraph is

enacted [enacted Sept. 1960]; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work.

20 C.F.R. §404.1592(a)

THE TRIAL WORK PERIOD

(a) Definition of the trial work period. The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work period in determining whether you disability ended at any time after the trial work period.

(b) What we mean by services. When used in this section, services means any activity, even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit. It you are an employee, we will consider your work to be services if in any calendar year after 1989 you earn more than $200 a month ($75 a month is the amount for calendar years 1979 through 1989, and $50 a month is the amount for calendar years before 1979), or you work more than 40 hours a month in the business in any calendar year after 1989 (15 hours a month is the figure for calendar years before 1990). We generally do not consider work to be services when it is done without remuneration or merely as therapy or training, or when it is work usually done in a daily routine around the house, or in self-care.

(c) Limitations on the number of trial work periods. You may have only one trial work period during a period of entitlement to cash benefits.

(d) Who is and is not entitled to a trial work period. (1) Those who are receiving disability insurance benefits, child's benefits based on disability and, beginning December 1, 1980, those who are receiving widows' or widowers' benefits based on disability, or surviving divorced spouses' benefits based on disability, generally are entitled to a trial work period. (2) You are not entitled to a trial work period if — (i) You are entitled to a period of disability but not to disability insurance cash benefits; or

(ii) You are receiving disability insurance benefits in a second period of disability for which you did not have to complete a waiting period. (e) When trial work period begins and ends. The trial work period begins with a month in which you become entitled to disability insurance cash benefits, to child's cash benefits based on disability or to widow's, widower's, or surviving divorced spouse's cash benefits based on disability. It cannot begin before the month in which you file your application for benefits and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earlier:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services; or (2) The month in which new evidence, other than evidence relating to any work you did during the trial work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled (see §404.1594).

[45 FR 55584, Aug. 20, 1980, as amended at 49 FR 22273, May 29, 1984; 50 FR 50130, Dec. 6, 1985; 54 FR 53605, Dec. 29, 1989]

United States Court of Appeals
For the Sixth Circuit

Nos. 97-3524; 97-3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from a Judgment of the United States District Court for the Northern District of Ohio

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EXCERPTS FROM PETITION OF U-HAUL CO. OF CLEVELAND FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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* * * *

(5th Cir. *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513, 518 1997), *petition for cert. Filed* Dec. 15, 1997. The Eighth Circuit's position is that if plaintiff receives disability payments, a court should "carefully scrutinize" the evidence and that the plaintiff's burden is "particularly cumbersome, for summary judgment should issue unless there is some strong countervailing evidence that the employ . . . is, in fact, qualified." *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997).

In short, no clear standard exists in this Circuit (or for that matter *among* the Circuits) to guide lower courts in addressing the issue of when plaintiffs' representations

preclude them from claiming, as a matter of law, they are able to perform their former jobs. This lack of a clear standard likely contributed to the present panel's misunderstanding as to whether U-Haul conceded the preclusion issue in its entirety. The panel decision should be reconsidered in light of the *Blanton* holding, which would permit judgment as a matter of law in favor of U-Haul. Additionally, en banc review is necessary to "articulat[e] broad rules" to ensure uniformity of this Court's decisions. U-Haul thus respectfully requests rehearing and suggests rehearing en banc would be appropriate as well.

B. U-Haul did not waive its argument that U-Haul was entitled to judgment as a matter of law but merely conceded *per se* judicial estoppel did not apply.

U-Haul prepared its initial brief at a time when most other courts had ruled that prior representations by plaintiffs of total disability *per se* judicially estopped their claims under the ADA. The Sixth Circuit subsequently reached this issue in *Blanton*, 123 F.3d at 917, a decision which foreclosed the use of *per se* judicial estoppel, but nonetheless used an "overwhelming weight" standard to grant the employer judgment as a matter of law.

The panel decision mistakenly states that U-Haul conceded its entire argument it was entitled to judgment as a matter of law, when it merely conceded *per se* judicial estoppel did not apply:

> "U-Haul conceded its argument concerning the applicability of judicial estoppel . . . has since been foreclosed by this court's decision in *Blanton v. Inco Alloys Int'l Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and

Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998). (Panel Op. At 11, Ex. A.)

Instead, U-Haul only conceded that it could not prevail on the doctrine of *per se* judicial estoppel under cases such as *Blanton*, based upon plaintiff's consistent and repeated assertions of disability. (James Aff., attached at Ex. B.)

After making the concession that plaintiff was not *per se* estoppel, counsel for U-Haul had prepared to make and attempted to make the argument that, under *Blanton*, this Court examines representations of disability in granting judgment as a matter of law. Questioning by the panel, however, cut off this argument and prevented counsel from returning to it.[3] (James Aff., Ex. B.)

U-Haul argued in its Reply brief, written after *Blanton*, that *Blanton* "does not support the result plaintiff seeks in this case." (App. Reply Br. At p. 4.) *Griffith*, 135

* * * *

[3] On September 22, U-Haul's counsel contacted the Clerk of Court to request the audiotape of oral argument. Counsel was told that pursuant to this Court's new rule on obtaining audiotapes, counsel had to make a written request for such tape. Counsel was told the tape could not only be obtained in the discretion of the Chief Judge. Counsel for U-Haul did make a written request, but has not yet obtained approval to receive a copy of the tape. (James Aff., Ex. B.)

United States Court of Appeals
For the Sixth Circuit

Nos. 97-3524; 97-3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from a Judgment of the United States
District Court for the Northern District of Ohio

AFFIDAVIT OF RONALD J. JAMES,
(as attached to REPLY OF U-HAUL OF CLEVELAND TO KUNKLE OPPOSITION TO U-HAUL (sic) MOTION FOR RECALL OF MANDATE)

STATE OF OHIO	)	
	)	SS: AFFIDAVIT OF
COUNTY OF	)	RONALD J. JAMES
CUYAHOGA	)	

I, RONALD J. JAMES, being first duly sworn, depose and state as follows:

1. I am lead counsel for Defendant-Appellant U-Haul. On July 31, 1998, I presented oral argument to this Court.

2. The panel decision issued September 16, 1998, states that U-Haul "conceded that this argument concerning the applicability of judicial estoppel in this context has since been

foreclosed by this Court's decisions in *Blanton* and *Griffith*." Although U-Haul conceded that *per se* judicial estoppel no longer applied, U-Haul did not concede its entire argument that plaintiff's continued and repeated representations of disability entitle U-Haul to judgment as a matter of law.

3. In my opening remarks to the Court, I conceded that the Appellant's initial position regarding *per se* judicial estoppel effect of prior representations of disability had been foreclosed by the Court's decision in *Blanton v. Inco Alloys, Inc.*, 123 F. 3d 376 (6th Cir. 1998), *supplementing* 108 F. 3d 104 (6th Cir. 1997) and subsequent decisions, particularly *Griffith v. Wal-Mart Stores, Inc.*, 135 F. 3d 376 (6th Cir. 1998). U-Haul's position at oral argument was and continues to be that after *Blanton* and subsequent cases, there is no longer a basis for arguing that an ADA plaintiff who has made prior representations of total disability is *per se* judicially estopped; however, such plaintiff cannot escape the consequences of those prior representations. It is clear that this Court considers such representations to be material facts to be given substantial weight in analyzing whether an employer is entitled to judgment as a matter of law. I had prepared to make this argument but was foreclosed from further elaboration by the panel's questioning.

4. On September 22, 1998, I contacted the office of the Clerk of Court for the United States Court of Appeals for the Sixth Circuit to request a copy of the audiotape of oral argument conducted on July 31. I was told that pursuant to the Court's new rule on obtaining audiotapes, I would have to submit a written request.

5. On September 22, I submitted a letter requesting a copy of the tape of oral argument, as per the Clerk's instructions. I received a letter dated October 14 from the Manager of Administrative Services in the Clerk's Office

denying me my request for the audiotape without any explanations as to why.

6. Once I became actually aware of the Court's denial of our Petition for Rehearing on December 3, I resumed my efforts to acquire the audiotape. Both personally and through a firm colleague, I telephoned the Clerk of Courts. The official I spoke with told me that, because the mandate had already issued, the Court's standard procedure was to discard the tape in the trash. The official then verified that the tape I was seeking was in fact gone.

7. In the same manner, we contacted the chambers of all three judges on the panel in the hopes that one of them might still have a copy of the tape. These efforts proved likewise fruitless.

8. I continue to assert that all I stated at oral argument was the *per se* judicial estoppel was no longer a valid argument in the wade of *Blanton* and subsequent ruling, and that I never conceded anything else. I am unable to prove this assertion, however, as the Court never allowed me to gain access to the audiotape recording of oral argument.

/s/ Ronald J. James
Ronald J. James

SWORN TO BEFORE ME and signed in my presence this 16th day of December, 1998.

/s/ Marcia A. McGratty
Notary Public

Marcia A. McGratty
Attorney at Law
Notary Public- State of Ohio
My commission has no expiration date,
Section 147.03 O.R.C

Supreme Court, U.S.
FILED
FEB 16 1999
OFFICE OF THE CLERK

(3)

No. 98-1097

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

U-HAUL CO. OF CLEVELAND,
Petitioner,
v.
LEE KUNKLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1998

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U-HAUL CO. OF CLEVELAND,

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LEE KUNKLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONER[1]

Respondent Kunkle recognizes that the issue pending before this Court in *Cleveland* v. *Policy Management Systems Corp.* "arises * * * because it can be inconsistent for a disabled person to represent that he *can* perform the essential functions of his position, for purposes of the ADA, if he has previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability program." Opp. at 4 (emphases in original). There is no dispute that respondent Kunkle has, through this ADA litigation, "represent[ed] that he *can* perform the essential functions of his position," and that he has "previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability pro-

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[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

gram." Thus, the questions at issue in *Cleveland* also "arise" in this case. The Court should therefore defer consideration of the petition until it issues its decision in *Cleveland*, and then dispose of the petition as appropriate in light of that decision.

In his effort to avoid this result, respondent contends that this case differs from *Cleveland* on several grounds, and that these differences present obstacles to consideration of this case no matter what the outcome of *Cleveland*. Respondent's attenuated efforts to distinguish this case from *Cleveland* provide no basis for denying the petition. The issues presented in *Cleveland* are also present here, and the claimed distinctions should, at most, be considered by the court below after resolution of the legal questions presented in *Cleveland*.

1. Respondent's arguments notwithstanding, both this case and *Cleveland* involve the same type of contradictory representations about disability. Both Cleveland and Kunkle applied for Social Security benefits on the ground that they were disabled, and each nonetheless claims in subsequent ADA litigation to be a "qualified individual with a disability." Respondent contends that Cleveland never "indicated to the Social Security Administration (SSA) that she was anything other than totally disabled and unable to return to work," and that "[w]hat distinguishes Kunkle's case from Cleveland's is the fact that once Kunkle recovered to the point * * * that he could return to work, he told SSA so." Opp. at 5. As the Fifth Circuit observed in its *Cleveland* opinion, however, Cleveland also alleged "that when she returned to work * * * she contacted SSA and informed them that she had returned." *Cleveland* v. *Policy Management Sys. Corp.*, 120 F.3d 513, 514 (5th Cir. 1997). There is therefore no basis for Kunkle's efforts to distinguish his case factually from Cleveland's.

2. Respondent also contends that his case is "not even a case for judicial estoppel" because of his participation in the "trial work" program under 42 U.S.C. § 422(c) and 20 C.F.R. § 404.1592(a). Opp. at 4, 5. To participate in this program, respondent explains, he did not have to continue in his earlier representations that he was disabled from working, and therefore should not be estopped from claiming to be a qualified individual with a disability for purposes of his ADA lawsuit. Opp. at 5-6.

This argument ignores the issues in *Cleveland*—whether *prior* representations of disability for purposes of Social Security disability benefits give rise to a rebuttable presumption in the ADA context and, if not, what evidentiary weight, if any, they should be accorded. Regardless of the conditions under which Kunkle returned to work, the fact remains that he—like Cleveland—first claimed to be disabled and later claimed to be qualified to work. Once the Court clarifies the effect of such facts in *Cleveland*, the case should be remanded to the lower courts to determine the impact of that determination in the particular circumstances of this case. Indeed, that is the purpose for which the Court frequently employs the "GVR" procedure. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits"). *See also id.* at 181 (GVR in light of a postjudgment decision of this Court is "appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts)") (Scalia, J., dissenting).

3. Respondent's waiver argument also provides no basis for denying the petition. That argument is grounded in the premise that U-Haul's petition is based solely on judicial estoppel, Opp. at 6, and that at oral argument

in the Sixth Circuit U-Haul's counsel recognized that recent circuit precedents, including *Blanton* v. *Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith* v. *Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998), *pet. for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991), were against it on the broad judicial estoppel point.

Petitioner's recognition that one of its arguments was "foreclosed" in the court below by circuit precedent, Pet. App. 11a—which may no longer be good law after *Cleveland*—hardly precludes it from pressing that argument *here*.

There is no dispute that in the courts below, U-Haul raised a judicial estoppel argument *and* argued that it was entitled to judgment as a matter of law if Kunkle's statements to the SSA were accorded appropriate evidentiary weight. *See* Pet. 7 & n.2.[2] By the time the case reached oral argument in the Sixth Circuit, however, that court had—in *Blanton* and *Griffith*—rejected application of a *per se* judicial estoppel doctrine in this context. While petitioner therefore "conceded" at argument the current state of Sixth Circuit law, that "concession" was not in any sense a waiver of the argument (and the Sixth Circuit did not so hold, *see* Pet. App. 11a), and provides no basis for denying the petition in light of the distinct possibility that the law might well have to be revisited by the Sixth Circuit after resolution of the pending *Cleveland* case.

First, the Court in *Cleveland* might determine that there is in fact a rebuttable presumption of judicial estoppel in these circumstances. If that were the case, the Sixth Cir-

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[2] These two arguments, in fact, parallel the two questions the Court formulated when it granted certiorari in *Cleveland*, which are the questions presented in this case. *See* 67 U.S.L.W. at 3228-29; Pet. i.

cuit would likely have to re-examine its own precedents rejecting judicial estoppel outright, and U-Haul's statements concerning the effect of those precedents in the Sixth Circuit—like the precedents themselves—would no longer be pertinent. Certainly, in that event, there would be "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"—the sort of occasion in which a "GVR" is standard practice. *Lawrence* v. *Chater*, 516 U.S. at 168.[3]

Second, the Court in *Cleveland* might reject application of judicial estoppel in these circumstances and proceed to answer the second question it formulated—"what weight, if any should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a 'qualified individual with a disability' under ADA?" 67 U.S.L.W. at 3228-29. In this event, U-Haul's purported "concession" below would also be irrelevant, for U-Haul has maintained throughout this litigation that it is entitled to judgment as a matter of law if Kunkle's claims of disability before the SSA are given appropriate evidentiary weight. Indeed, in its decisions rejecting *per se* judicial estoppel, the Sixth Circuit itself recognized that statements concerning disability were nevertheless entitled to *some* evidentiary weight. *See* Pet. at 6. Once this Court clarifies the appropriate weight to be given to such statements, there could well be an occasion for the Sixth Circuit to re-examine its decision in this case.

In short, nothing about U-Haul's "concession" to the Sixth Circuit about the state of then-current *circuit* authority counsels against deferring consideration of the

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[3] While the Sixth Circuit's discussion might leave this Court in a position where it is "not certain that the case was free from all obstacles to reversal on an intervening precedent," it is the Court's practice even in that circumstance to grant, vacate, and remand for reconsideration in light of the intervening precedent. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964).

petition until *Cleveland* is decided, and then remanding the case to the Sixth Circuit to reconsider its decision in light of this Court's guidance in *Cleveland.*

4. It is clear that a decision by this Court in *Cleveland* could well give rise to "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater,* 516 U.S. at 167. The prudent course, therefore, is to hold the petition pending resolution of *Cleveland.*[4]

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[4] *See* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions,* 11 Hastings Const. L. Q. 5, 38 n.127 (1983) (arguing that it "would make a good deal of sense" to hold petitions that even remotely involve issues presented in pending cases, because "[t]he relevance of the plenary decision will often depend on how—and how broadly—the Court resolves the various issues presented. At the time the new case is filed, there may be no way of knowing what the result of the plenary decision will be, or which of several possible grounds ultimately will command a majority").

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should defer consideration of the petition until it issues its decision in *Cleveland* v. *Policy Management Systems Corp.*, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted,

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No. 98-1097

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U-HAUL CO. OF CLEVELAND,
Petitioner,

v.

LEE KUNKLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to S. Ct. Rule 15.8, Petitioner U-Haul Co. of Cleveland ("U-Haul")* submits this Supplemental Brief in light of this Court's decision in *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008. In its Petition filed January 8, 1999, U-Haul requested that the Court defer consideration of the Petition until it issued its decision in *Cleveland*. *Cleveland*, like this case, involved questions concerning the effect on ADA litigation of a plaintiff's earlier claims of total disability when seeking insurance benefits. U-Haul had argued below that Respondent Kunkle's statements concerning his disability when seeking benefits from the Social Security Administration precluded his ADA action as a matter of law or, if

* Petitioner's Rule 29.6 Statement appears at Pet. ii.

the action was not precluded, entitled U-Haul to judgment as a matter of law once those statements were given appropriate evidentiary weight. *See* Pet. 7 & n.2 (citing record).

On May 24, 1999, this Court issued its opinion in *Cleveland*. The Court rejected the first argument U-Haul had made in the courts below, holding that "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim * * * [n]or does the law erect a strong presumption against the recipient's success under the ADA." Slip op. at 1.

The Court also held, however, that "an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work," *id.* at 1-2, and that "[t]o survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'" *Id.* at 2. *See also id.* at 10 ("[A]n ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.").

It is this clarification of the evidentiary burdens on an ADA plaintiff that requires a remand for further consideration by the courts below. It is clear from the record that those courts did *not* require respondent Kunkle to "proffer a sufficient explanation" for "the apparent contradiction" arising out of his statements to the SSA. *Id.* When U-Haul moved for summary judgment, for example, the district court—in addition to rejecting U-Haul's claim that Kunkle was estopped from bringing his ADA claim—held simply that "representations by a plaintiff that he is entitled to disability benefits * * * [are] *only a factor to consider*" in an ADA case. Pet. App. 17a (emphasis

added). Saying that the statements are "only a factor to consider" is of course a far cry from this Court's requirement that a plaintiff must provide a "sufficient explanation" for the apparent inconsistency.

There is no evidence that the courts below applied the evidentiary standard articulated in *Cleveland* when the case was submitted to the jury, or when the courts considered U-Haul's motion for judgment as a matter of law. On the contrary, when U-Haul argued after trial that Kunkle's statements entitled it to judgment as a matter of law the district court wrote that it "declines to revisit the issue and stands by its prior ruling" on the motion for summary judgment, Pet. App. 25a—which treated the statements as "*only a factor to consider.*" Pet. App. 17a (emphasis added).

It is therefore clear from the record that the courts below did not apply the law as articulated by this Court in *Cleveland* to the facts of this case. In these circumstances, it is this Court's practice to leave that exercise to the lower courts in the first instance. *See Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits"). *See also id.* at 181 (GVR in light of postjudgment decision of this Court is "appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts)") (Scalia, J., dissenting). The Court should therefore grant the petition, vacate the decision below, and remand the case to the lower courts for further consideration in light of *Cleveland*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of *Cleveland* v. *Policy Management Systems Corp.*

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